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In The
Supreme Court of the United States

POINT REYES SEASHORE LODGE;
JEFFREY F. HARRIMAN; THOMAS R. HARRIMAN,

Petitioners,

v.

HOLLYNN DELIL,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' BRIEF IN REPLY

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ARGUMENT

I. THE DISTRICT COURT WAS NOTIFIED BY THE PARTIES ON JUNE 17, 2004 THAT THE SETTLEMENT AGREEMENT HAD BEEN COMPLETELY EXECUTED; THEREFORE, THE MARCH 24, 2004 DISMISSAL WITH PREJUDICE BECAME THE FINAL ORDER OF THE COURT AND TERMINATED ITS SUBJECT MATTER JURISDICTION OVER THE ENFORCEMENT OF THE SETTLEMENT AGREEMENT

The Court of Appeals and the Respondent have characterized the March 24, 2004 dismissal with prejudice (App16) as a *conditional* dismissal (App1-3). The Supreme Court since the adoption of the *Federal Rules of Civil Procedure* has never decided whether *Rule 41(b)* or any other federal rule authorizes the district court to grant a *conditional* dismissal with prejudice[1] nor has the Court held that any order can be automatically vacated without an order entered on the docket.

The use of a conditional dismissal and the practice by some district courts of clearing their dockets by dismissing an action subject to reinstatement was questioned by the Seventh Circuit in ***Otis v. City of***

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[1] *Rule 41(a)(2)*, however, specifically allows the district court to dismiss the complaint without prejudice with conditions upon application of the plaintiff after an answer has been filed by the defendant.

Chicago, 29 F.3d 1159 (7th Cir. 1994) because of the uncertainty such a dismissal interjects into the litigation and appellate process. The appellate court in ***Otis*** criticized the use of such a procedure because it has had the unintended effect of prolonging the litigation and fostering an ambiguous and confusing record. See, e.g., ***Ford v. Neese***, 119 F.3d 560, 572 (7th Cir. 1997); ***King v. Walters***, 190 F.3d 784, 786 (7th Cir. 1999); compare, ***Shaffer v. GTE North, Inc.***, 284 F.3d 500 (3rd Cir. 2002) [dicta questioning the concerns of the appellate court in ***Otis v. City of Chicago***]; ***Muze, Inc. v. Digital on Demand, Inc.***, 356 F.3d 492 (2nd Cir. 2004).

Moreover, such a practice appears to bypass the normal procedural requirements of a motion for an order to effect change in the status of the pending litigation (see *Fed.R.Civ.Proc., Rules 7, 60(b), 58, 79*). As suggested in the Petitioners' Petition, the Court is requested to clarify the procedural requirements for vacating an order entered on the docket dismissing an action with prejudice and for reinstating the previously dismissed action, as well as the procedure for vacating any other final order. Such a clarification is especially important when there is a factual conflict with regard to whether the condition for vacating a dismissal has been fulfilled or there is a possibility of further litigation if the dismissal or order is not the final act in disposing of a cause or issue.

The district court in the March 24, 2004 dismissal did not expressly retain jurisdiction over the enforcement of the settlement agreement (App16).

See ***Hagestad v. Tragesser***, 49 F.3d 1430 (9th Cir. 1995); ***O'Conner v. Colvin***, 70 F.3d 530 (9th Cir. 1995). If the March 24, 2004 dismissal was final when issued, or became a final order upon the happening of an event, i.e., the execution of a settlement agreement within 90 days, the district court lost subject matter jurisdiction to grant the Respondent her claim for statutory attorney's fees as the "prevailing party." ***Buckhannon Board & Care Home, Inc. v. W. Va. Dep't of Health and Human Resources***, 532 U.S. 598 (2001); ***Kokkonen v. Guardian Life Ins. Co. of America***, 511 U.S. 375 (1994); see also ***American Disability Association, Inc. v. Chmielarz***, 289 F.3d 1315 (11th Cir. 2002).

The Respondent in her Brief at page 3 continues to maintain that her act of certifying to the district court on June 3, 2004, that all aspects of the lawsuit (i.e., the claims raised by the pleadings) were not settled, was sufficient to restore the matter to the active trial calendar. This position is consistent with the holding in the memorandum of decision (App2). However, the appellate court in memorandum of decision and the Respondent incorrectly focused on the **act** of certification rather than the **condition** imposed for reinstating the action, which would have been the failure to execute a settlement agreement within 90 days.[2]

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[2] The billing records reflect that counsel was aware that the Respondent had signed the settlement agreement on April 30,

(Continued on following page)

The Respondent does not supply any rationale for the holding in the memorandum of decision that the March 24, 2004 dismissal (App16) was automatically vacated; and, she does not explain why the decision by the Ninth Circuit is not in conflict with the motion and docketing requirements of the *Federal Rules*, and why the memorandum of decision is factually and legally accurate. See *Fed.R.Civ.Proc., Rules 7, 60(b), 58 & 79.*

If the dismissal with prejudice was *conditional* and authorized by the *Federal Rules* or if the district court had the "jurisdiction pursuant to its inherent supervisory power" to issue a *conditional* dismissal with prejudice (App16), then the record on appeal clearly established that the condition imposed by the district court for vacating its dismissal had not been met. In order to arrive at the conclusion that the action was automatically vacated and restored to the calendar, the language used in the order dismissing the action must be ignored.

Respondent's claim for statutory attorney's fees is not a substantive claim for relief raised by the pleadings. Respondent's entitlement to an award of attorney's fees can only be had following the conclusion of the litigation and a finding by the district court as to who was the "prevailing party." 42 USC § 12205; ***White v. New Hampshire Dep't of Employment***

2004 and that as of May 13, 2004 he was in possession of the settlement agreement signed by the Petitioners on May 10, 2004 (ER Vol. 1, p. 125).

Security, 455 U.S. 445, 451-452 (1982). The Respondent attempts to avoid the decisions of the Supreme Court in ***White*** and ***Budinich v. Becton Dickinson & Co.***, 486 U.S. 196, 199-200 (1988) which specifically held that a claim for statutory attorney's fees " . . . 'raises legal issues collateral to' and 'separate from' the decision on the merits." ***Id.*** at 486 U.S. 200.

The complaint filed herein was for injunctive relief pursuant to 42 USC § 12188(a) and damages pursuant to various California statutes (ER1-13). The substantive claims raised by the complaint were all resolved at the mandatory settlement conference, and the settlement was memorialized pursuant to a written agreement executed by all the parties by May 10, 2004 (App18), within the ninety (90) days specified by the *conditional* dismissal (App16). Furthermore, the district court was notified of the settlement by parties in the Joint Case Management Statement on June 17, 2004 (App29, DE49; ER18-19) also prior to the expiration of 90 day deadline.[3]

As was noted previously, the decisions in ***Buckhannon*** and ***Kokkonen*** required that the Respondent obtain a judicially enforceable settlement agreement or a judgment in her favor **before the**

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[3] The June 17, 2004 (App29, DE49) Joint Case Management Statement prepared by the Respondent's counsel stated: "The parties have resolved the injunctive relief and damages aspects of the lawsuit by Settlement Agreement and expect they will e file a dismissal of these aspects of the lawsuit prior to or shortly after the Case Management Conference." (ER19).

district court could determine her status as the "prevailing party." See ***American Disability Association, Inc. v. Chmielarz***, 289 F.3d 1315 (11th Cir. 2002). Thus, the issue of attorney's fees was never part of the lawsuit before the district court **at the time of the certification.**

Consequently, if dismissal was conditioned upon the finalization of the settlement agreement, the dismissal became a "final order" on June 17, 2004 when the parties confirmed the condition had been fulfilled. (App29, DE49). The *June 17* notification superseded and corrected the factual representation in the certification filed on June 3, 2004 (App29, DE45) within the 90 period. Hence, there was no cause or litigation for the district court to reinstate after May 10, 2004.

It was the failure to consummate a settlement agreement within 90 days, and not the **act** of certification, which would cause the dismissal to be vacated and set aside.

To date the petitioners have not found any decision of the Court or a decision of any Court of Appeals holding that an action could be automatically vacated by the mere filing of a factually and legally inaccurate certification by a party's counsel as held by the Ninth Circuit in the memorandum of decision (App1-3) or as asserted by the Respondent.

The Respondent has not articulated any justification for the district court or the Ninth Circuit substituting the improvised procedure of certification with the attendant automatic vacation of the dismissal for the orderly procedures set forth in the *Federal Rules,* which requires the filing of a noticed motion that sets forth the basis for vacating the order and a subsequent entry of an order disposing of the motion (see *Fed.R.Civ.Proc., Rules 7, 60(b), 79*). Had the normal procedures authorized by the *Federal Rules* been utilized, the issue as to whether the action had been settled would have been squarely before the district court and could have been resolved like any other disputed fact.

The Respondent has alluded to the fact that the memorandum of decision in this case was not a published opinion and therefore cannot be cited as authority in any other case as a reason for denying the Petitioners' relief. The Court on numerous occasions has granted the writ of certiorari in a case involving an unpublished opinion where there was a need to clarify particular procedures or jurisdictional issues. See, e.g., ***Kokkonen v. Guardian Life Ins. of America***, 511 U.S. 375 (1994); ***Buckhannon Board & Care Home, Inc. v. W. Va. Dep't of Health and Human Resources***, 532 U.S. 598

(2001).[4] Petitioners urge the Court to exercise its discretion and issue the writ in this matter.

II. THE SECOND ORDER FOR DISMISSAL ENTERED ON JULY 19, 2004 WAS THE FUNCTIONAL EQUIVALENT OF A CONSENT DECREE AND WAS A JUDGMENT AS DEFINED BY *RULE 54(a)*; CONSEQUENTLY, THE RESPONDENT WAS REQUIRED TO FILE HER MOTION FOR ATTORNEY'S FEES WITHIN 14 DAYS OF THE ENTRY OF THE ORDER PURSUANT TO *RULE 54(d)(2)(B)* OR *CIVIL LOCAL RULE 54-6*

The Respondent postulates that she was not required to comply with the timely filing requirements of either the *Federal Rules* or the *Civil Local Rules* in order to receive an award of statutory attorney's fees because of the novel assertion that the July 19, 2004 Order for Dismissal (App17-20) was not a "judgment" as defined by *Rule 54(a)*.[5]

A dismissal which includes a reservation of jurisdiction to enforce a settlement agreement or which incorporates the terms of the settlement agreement is a hybrid order which arose after the

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[4] Although not raised at the district court level, the jurisdictional issue was raised on appeal and decided by the Ninth Circuit in its memorandum of decision and is properly before this Court. See ***Shaffer v. GTE North, Inc.***, 284 F.3d 500, 502 (3rd Cir. 2002).

[5] See Brief in Opp. pp. 4-6, 18, 27-28.

decision of the Court in ***Kokkonen*** and ***Buckhannon***. Since the decisions in ***Kokkonen*** and ***Buckhannon***, the Court has not ruled upon the status of a dismissal as a judgment pursuant to *Rule 54(a)* where the district court retained jurisdiction to enforce a settlement agreement.

Rule 54(a) defines a judgment as follows: "'Judgment' as used in these rules includes a **decree** and any order from which an appeal lies."

The Eleventh Circuit in ***American Disability Association, Inc. v. Chmielarz***, 289 F.3d 1315 (11th Cir. 2002) addressed the interaction of the two Supreme Court opinions and reconciled the holding in each by coming to the conclusion that an order of the district court dismissing an action that either incorporates the terms of a settlement agreement or expressly retains jurisdiction to enforce the settlement agreement is the functional equivalent of a consent decree. ***Id.*** at 289 F.3d 1320. The court in ***Chmielarz*** further held that:

> The formal entry of a consent decree [is] wholly unnecessary and would not effect the status of the parties or the district court's power to enforce the terms of the settlement. Rather, by approving the terms of the settlement agreement and then expressly retaining jurisdiction to enforce its terms, the district court effected (sic) precisely the same results as would have been achieved pursuant to a consent decree. *Id.* at 289 F.3d 1321.

Petitioners maintain, pursuant to the holding in ***Chmielarz,*** that the hybrid dismissal order is the functional equivalent of a consent decree; and therefore, it is a judgment as defined by *Rule 54(a)*. See ***Kiwi Coders Corporation v. Acro Tool & Die Works***, 250 F.2d 562, 568 (7th Cir. 1957) [A consent decree is a judicial act [citation omitted] with the same force and character, therefore, as a judgment rendered following a contested trial].

The Petitioners' request that the Court issue the writ of certiorari and adopt the reasoning of the Eleventh Circuit in ***Chmielarz*** and hold that a dismissal which incorporates a settlement agreement or which expressly retains jurisdiction to enforce the terms of a settlement agreement is the functional equivalent of a consent decree and is a judgment as defined by *Rule 54(a)* which required the Respondent to file her fees motion within the 14 days specified by *Civil Local Rule 54-6*.

III. THE DISTRICT COURT DID NOT HAVE THE UNTRAMMELED DISCRETION TO EXTEND THE TIME FOR THE RESPONDENT TO FILE HER MOTION FOR FEES

The Respondent asserts that the following language of *Rule 54(d)(2)(B)*: "Unless otherwise provided by . . . order of the court . . . " grants to the district court the discretion to waive the 14 day deadline for the filing of her fees motion pursuant to *Civil Local Rule 54-6*. In this case there is no order of the district

court either setting a specific time or enlarging the time for the Respondent to file her motion for fees.

Pursuant to the *Civil Local Rule 54-6* the Respondent was required to file her fees motion by August 2, 2004. Both the district court (App7-8) and the Ninth Circuit (App3) held that it was not necessary for the Respondent to comply with the local rule. Neither court provided any case authority for their holdings and the district court's rationale is contrary to the holding in ***Tancredi v. Metropolitan Life Ins. Co.***, 378 F.3d 220 (2nd Cir. 2004), cert. denied, 539 U.S. 942 (2003).

The Second Circuit in ***Tancredi*** construed "order of the court" as used in *Rule 54(d)(2)(B)* as meaning only the local rules adopted by the entire district and not those of a particular district court judge.

After reviewing several appellate decisions from other circuits concerning the local rules which modified the 14 day deadline for filing a fees motion, the court in ***Tancredi*** concluded that:

> None of these cases, however, suggest that "order of the court" confers on district courts untrammeled discretion to extend the time to file a fee motion. Based upon the reasoning of these cases and the text of *Rule 54* itself, we are persuaded that reading "order of the court" to mean an individual judge's order extending the deadline . . . would threaten the concept of a uniform deadline – even at the district level – and fly in the face of the

rationale underlying the deadline. ***Id.*** at 378 F.3d 227.

In addition, the court in ***Tancredi*** held that *Rule 54(d)(2)(B)* had to be read together with *Rule 6(b)(2)* and " . . . absent a statute or order of the court such as a local rule, the district court was required to find 'excusable neglect' under *Rule 6(b)(2)* to extend the time to move for attorney's fees after the expiration of *Rule 54's* fourteen day deadline." ***Id.*** at 378 F.3d 227-228.

The Respondent has never explained why she did not file her fees motion within the deadline of the local rules or seek an enlargement of time. Moreover, neither the district court nor the appellate court provided any legal basis for the Respondent being excused from complying with the local rules. The Court is requested to address the conflict between the Second and the Ninth Circuits' interpretation of "order of the court" as used in *Rule 54(d)* and adopt the ***Tancredi*** court's interpretation limiting the discretion of the district court to avoid the local rules.

CONCLUSION

The record on appeal reflects a casual approach to the application of the *Federal Rules of Civil Procedure* and *Civil Local Rules* by the district court and the Ninth Circuit.

The logical conclusion to be drawn from the district court's order awarding attorney's fees and the memorandum of decision affirming the award is: the timely filing of a fees motion is superfluous (App3) and the district court judge has the discretion, without notice to the defendant, to waive the requirement for the plaintiff to follow the local rules for obtaining an enlargement of time and the time deadlines for the filing of a fees motion. Furthermore, if necessary, the district court can retroactively, and without notice to the defendant, grant an extension of time and waive the filing of a motion to enlarge time pursuant to *Rule 6(b)* or *60(b)* by the plaintiff (App7-8, 21-22).

The district courts have not heretofore been granted such untrammeled discretion to dispense with the compliance with the procedures authorized by the federal and local rules and to retroactively waive compliance with the local rules.

The Court is requested to issue the writ of certiorari in order to clarify the discretion of the district court to (1) conditionally dismiss an action with prejudice; (2) vacate a dismissal with prejudice without a hearing or the entry of a specific order vacating the dismissal on the docket; and (3) dispense with a party's compliance with the federal and local

procedural rules. The Court is further requested to reverse the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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